

**APPEAL NO. 22-CV-418**

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**DISTRICT OF COLUMBIA  
COURT OF APPEALS**

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**THE BURRELLO GROUP, LLC  
AND JOSE BURRELLO**

**Defendants, Appellants**

**v.**

**DISTRICT OF COLUMBIA**

**Plaintiff, Appellee**

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**Appeal from the Superior Court for the  
District of Columbia, Civil Division  
Case No. 2020 CA 002870 B  
(The Honorable Anthony Epstein, Judge)**

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**SUPPLEMENTAL REPLY OF APPELLANTS THE BURRELLO GROUP,  
LLC AND JOSE BURRELLO TO THE AMICUS BRIEF OF THE  
LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA**

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Defendants/Appellants, The Burrello Group, LLC, d/b/a Burrello Investment Group, and Jose Burrello, a District-licensed real estate broker and agent of The Burrello Group, LLC (collectively “Defendants” or “Burrello” or “Appellants”) hereby file their Response to the Brief of Amicus Curiae (“Amicus Brief”) of Legal Aid of The District of Columbia (“Legal Aid”).

## **ARGUMENT**

### **A. Legal Aid’s Inapplicable “Policy” Arguments**

The dispute on appeal is a “legal” issue, not a “policy” issue. *See* Burrello Reply Brief at 2-3. Many of Legal Aid’s arguments are citations to third party research and articles that are plainly outside the record of this instant case. *See* Amicus Brief at 3-4, 8-12. Defendants are not in a position, nor could they be, to address these complex policy arguments. Legal Aid’s arguments are more appropriately presented to political actors.

However, in brief response to the issues raised by Legal Aid, the Burrello Defendants note that their investments, smaller as they may be, are in areas of D.C. that have historically received less substantial capital spending. Investment in underserved areas in the District of Columbia, particularly by racial minorities like Mr. Burrell, is arguably part of the solution to housing affordability.

## **B. The DCHA Voucher “Approval” Process is Not Disputed**

Next, Legal Aid admits that the DCHA approval process has numerous steps that any applicant must undertake in order to have a property “approved” for the voucher program, including, among other things, “an inspection of the unit.” *See* Amicus Brief at 7. Defendants have no control over this process, which is implemented by DCHA under the auspices of District of Columbia Municipal Regulations. Burrello previously addressed this issue in detail. *See* Burrello Reply Brief at 3-4. The fact that there is an applicable “approval process” for voucher holders is an issue that is not in dispute.

Legal Aid then argues that “there is no regular process for a property to be deemed ‘approved for vouchers’ before a voucher holder applies.” *See* Amicus Brief at 7. This statement is misleading, if not inaccurate. There *is* a legal “process,” namely, the procedures set forth in the District of Columbia Municipal Regulations. Many of these rules expressly utilize the “not approv[ed]” language in the text of the regulations themselves. *See* Burrello Reply Brief at 3-4. Even if there are slight variations in the day-to-day practice of DCHA voucher approvals, the applicable regulations are clearly recorded in written form. This Court cannot, and should not, attempt to legally interpret the “practical reality” of the voucher approval process.

### C. Applicable “Exceptions” Under D.C. Code

In a footnote, Legal Aid cites to D.C. Code § 2-1401.03(a), entitled “Exceptions” and broadly argues that this statutory provision is inapplicable. *See* Amicus Brief at 13 n 4. However, Legal Aid itself admits that there is an “exception to the general statutory prohibition on discrimination” if the “discriminatory act was *both* (1) not intended to violate the statute (a subjective requirement) *and* (2) justified by a business necessity (an objective requirement).” *Id.* (emphasis in original).

Assuming Legal Aid’s legal interpretation is correct, the Burrello Defendants’ alleged actions would *squarely* fall into the “exception” category. First, the undisputed evidence in this matter is that the Burrello Defendants did not “intend” to discriminate.<sup>1</sup> *See* Burrello Brief at 8. Second, the “business necessity” in this instance was the Burrello Defendants’ compliance with the applicable regulations. *See* Burrello Reply at 3-4.

While Legal Aid raises this issue in a statutory context, the statute cited by Legal Aid almost perfectly tracks the analysis under the judicial precedent already cited and briefed by Burrello. *See generally* Burrello Brief, Burrello Reply. Namely, there is a factual question as to whether the Burrello Defendants “intentionally devised” a plan to discriminate. *See* D.C. Code § 2-1401.03. That

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<sup>1</sup> At the absolute minimum, it is a factual question that must be presented to a jury.

factual question requires resolution by a jury that the Burrello Defendants lawfully demanded.

**D. Legal Aid is Not Well-Equipped to Determine Whether an Advertisement is *Per Se* Discriminatory, Compared to a Jury**

Next, Legal Aid adopts the District’s arguments that the advertisement was *per se* discriminatory. The Burrello Defendants previously addressed this issue in detail, but their positions are worth repeating:

The mere fact that the District *wants* the language to be facially discriminatory, and that the District *believes* that it is, does not preclude a finding that the language has differing reasonable interpretations that must be resolved by a jury.

*See* Burrello Reply at 12 (emphasis in original). Burrello’s positions on this issue as they relate to the District are equally applicable to Legal Aid’s nearly identical arguments. Burrello also previously noted that the “Office of the Solicitor General” and the “Office of the Attorney General” are not reasonable factfinders in this context. *Id.* Legal Aid of the District of Columbia is similarly ill-equipped to serve as a neutral fact-finding arbiter in this case, given its noted interests and ongoing advocacy on similar issues. *See* Amicus Brief at vii.

Regrettably, some of Legal Aid’s arguments and factual representations are simply wrong. Legal Aid argues that the language of the advertisement “indicated that a prospective renter could not pay with a voucher.” *See* Amicus Brief at 14. Nothing could be further from the truth. The advertisement did not say “you cannot

pay with a voucher.” It truthfully indicated that the property had not met the DCHA’s approval process.

Legal Aid next suggests that the truthful language in the advertisement, describing the property’s status under the DCHA approval process, was “discouraging” to applicants. This argument improperly attempts to assign blame to the wrong party. The Burrello Defendants have no control over the statutes or regulations pertaining to the DCHA voucher approval process. Legal Aid’s argument is an example of the metaphorical practice of “blaming the messenger.” This is particularly true where Legal Aid itself recognizes the barriers imposed by the DCHA voucher approval process. *See* Amicus Brief at 6-7.

Next, Legal Aid cites to another case where an advertisement mandated an “additional cost” for a voucher holder. *See* Amicus Brief at 15. The advertisement in this case does not impose *any* additional costs and does not preclude *any* applicant from applying. It merely provides accurate information about the property’s DCHA approval status under District of Columbia Regulations.

Legal Aid’s arguments continue in a very similar vein to those already made by the District, namely, that the advertisement should be considered “facially discriminatory” as a matter of law. *See* Amicus Brief at 14-15. Burrello previously addressed those issues in substantial detail. *See* Burrello Brief at 6-13, Burrello Reply at 7-13.

### **E. Similar Federal Statutes Are Not Controlling**

Legal Aid also argues that “several similar federal statutes” are applicable. *See* Amicus Brief at 15-18. However, this Court has very recently addressed, and largely rejected, that argument:

However, “we have also observed that [the DCHRA] is different from the federal statutes in other significant ways[.]” Thus, while federal precedent is certainly persuasive, it “does not necessarily dictate the same result under DCHRA.

*Rose v. United Gen. Contractors*, 285 A.3d 186 (D.C. 2022) (*citing East v. Graphic Arts Indus. Joint Pension Tr.*, 718 A.2d 153, 159-160 (D.C. 1998)).

Moreover, the Burrello Defendants have explained, in detail, that these interpretations are simply inapplicable when there is no “facial discrimination,” as is the case here. *See* Burrello Brief at 6-13, Burrello Reply at 7-13.

### **F. Legal Aid’s Misleading and Inapplicable Arguments About the Text of the Advertisement**

Legal Aid wrongly and misleadingly states that the advertisement in this case was “*explicit* discouraging of applications by voucher holders.” *See* Amicus Brief at 18 (emphasis added). Nothing could be further from the truth.

First, there is no evidence of *any* applicant or voucher holder being “discouraged” in the trial record. Moreover, the suggestion that the truthful language in the advertisement constituted an “explicit” discouragement of applicants is very difficult to take seriously. An explicit discouragement might be

language stating that “voucher holders will not be considered” or “applications by voucher holders considered only after applications submitted by market tenants.” Those instances explicitly state preferences or limitations on applicants. The Burrello advertisements do not state preferences, and any suggestion that the Burrello advertisements were “explicitly” discouraging voucher holders is simply not credible.

Legal Aid continues its arguments, stating that:

The advertisement here expressly singled out a protected class and informed voucher holders that they were disfavored applicants and less likely to be rented a unit than individuals who were not seeking to use vouchers.

*See* Amicus Brief at 18. This misleading passage introduces a litany of problems, and indisputably demonstrates that Legal Aid is not the disinterested factfinder that this case requires.

First, the advertisement does not “single out” out a protected class any more than the DC Municipal Regulations “single out” voucher holders for additional mandates. By Legal Aid’s standards, the D.C. Municipal Regulations, in setting forth the standards for voucher approvals to secure a property, are discriminatory in practice. Mr. Burrello’s advertisement, accurately explaining that the property had not been approved for vouchers under the District’s Municipal Regulations, imposed *no* additional restrictions or limitations on *any* applicant. Legal Aid’s

arguments appear to be attacks that are more appropriately directed at the voucher applicant process set forth under the District's Municipal Regulations.

Legal Aid's argument then becomes unusually extreme, when it suggests that the Burrello advertisement is synonymous with text such as "people with disabilities require additional approvals" or "Christians not welcome," or "everyone else who lives in this building is a racist." *See* Amicus Brief at 18. These examples are not remotely synonymous with the issues in the instant case.

Consider Legal Aid's argument about a potential advertisement employing the text "people with disabilities require additional approvals." To the best of the Defendants' knowledge,<sup>2</sup> there are no Municipal Regulations that impose "additional approvals" on "people with disabilities." Compare that to this case, where there are indisputably regulations that state that there are circumstances where a "tenancy is not approved because the unit is ineligible." *See* 14 DCMR § 5214.16.

What about Legal Aid's example of "Christians not welcome" being discriminatory? In that case, the advertisement is about the *person*, not the *property*. Burrello's advertisement in this case, indisputably about the property, truthfully reported the status of the property under applicable District law. Again,

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<sup>2</sup> Defendants are making all reasonable efforts to address issues raised in the Amicus Brief. However, some of the hypotheticals raised by the Amicus Brief raise legal issues well outside the scope of the present matter.

to the best of Defendant's knowledge, there are no District regulations specifically applicable to "Christians."

Next, Legal Aid curiously proposes the language: "everyone else who lives in this building is a racist." That advertisement is, again, about the *people*, and not about the property. There are also no known relevant regulations regarding "buildings full of racists."

Later, Legal Aid argues that it is an "objective reality" that the advertisement stated that "voucher-holders would be disfavored and/or rejected." *See* Amicus Brief at 19. There is *no* evidence, of any kind, that any voucher-holder was rejected or disfavored. This is even after the District fully engaged in the fact-discovery process at the trial level. The advertisement does not say, for example, "voucher-holders will be rejected." Legal Aid's suggestion that the advertisement creates an "objective reality" of discrimination is simply not credible.

Next, Legal Aid suggests that the timing of the required inspections under the regulations should somehow color the analysis. *Id.* at 19. The "timing" is irrelevant. Again, the advertisement was truthfully advising about the property and about the DCHA approval process. Moreover, the suggestion that the advertisement "conveyed no information" is simply inaccurate. The language conveyed accurate information about the property's status under the DCHA

regulatory framework. The language also imposed no additional burden or restriction on any applicant.

### **G. Legal Aid’s Arguments Largely Mirror the District’s Arguments**

Legal Aid’s concluding arguments relate to the issue that has already been addressed in substantial detail by the interested parties, namely, instances that involve a “facially discriminatory advertisement.” *See* Amicus Brief at 22. The Burrello Defendants have explained, in detail, that the advertisement at issue in this matter is not “facially discriminatory.” *See* Burrello Brief at 6-13, Burrello Reply at 7-13.

### **CONCLUSION**

The policy discussions presented by the Amicus Brief are not properly before the Court and are more appropriately presented to political actors. The legal arguments presented by Legal Aid are largely synonymous with the arguments already presented by the District. The Court should limit its analysis of this case to the topical legal issues that have already been briefed in detail by the parties at interest.

\* \* \*

Respectfully submitted,

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**STATEMENT AS TO TYPEFACE**

The font used in this Brief is Times New Roman and the type size is 14 point.

**CERTIFICATE OF SERVICE**

I hereby certify that on March 10, 2023 a copy of the foregoing was delivered via the Court's electronic case filing system.

/s/ Eric Menhart

Eric J. Menhart

# District of Columbia Court of Appeals

## REDACTION CERTIFICATE DISCLOSURE FORM

**Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a “CV” docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.**

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

- An individual’s social-security number
- Taxpayer-identification number
- Driver’s license or non-driver’s’ license identification card number
- Birth date
- The name of an individual known to be a minor
- Financial account numbers, except that a party or nonparty making the filing may include the following:

- (1) the acronym “SS#” where the individual’s social-security number would have been included;
- (2) the acronym “TID#” where the individual’s taxpayeridentification number would have been included;
- (3) the acronym “DL#” or “NDL#” where the individual’s driver’s license or non-driver’s license identification card number would have been included;
- (4) the year of the individual’s birth;
- (5) the minor’s initials; and
- (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.
3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.
4. Information about protection orders, restraining orders, and injunctions that “would be likely to publicly reveal the identity or location of the protected party,” 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining “protection order” to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).
5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.
6. Any other information required by law to be kept confidential or protected from public disclosure.



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22-CV-418

Case Number(s)

3/10/2023

Date

**CERTIFICATE OF SERVICE**

I hereby certify that on March 10, 2023 a copy of the foregoing was delivered via the Court's electronic case filing system.

/s/ Eric Menhart  
Eric J. Menhart